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July 23, 2010

Via Federal Express

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: 2 Sisters Food Group, Inc.
and
United Food and Commercial Workers International Union, Local 1167
Case 21-CA-38915
21-CA-38932
21-RC-21137

Dear Mr. Heltzer:

Enclosed for filing are an original and eight copies of:

- Respondent's Exceptions to the Decision and Report on Objections of Administrative Law Judge Lana H. Parke

- Respondent's Brief in Support of Exceptions to the Decision and Report on Objections of Administrative Law Judge Lana H. Parke

Thank you for your attention to this matter.

Very truly yours,

Alan R. Berkowitz

Enclosures

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

2 SISTERS FOOD GROUP, INC. and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167	)	Case Nos. 21-CA-38915 21-CA-38932
2 SISTERS FOOD GROUP, INC. Employer and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167 Petitioner	)	21-RC-21137

RESPONDENT'S EXCEPTIONS TO THE DECISION AND REPORT ON OBJECTIONS OF ADMINISTRATIVE LAW JUDGE LANA H. PARKE

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RESPONDENT'S EXCEPTIONS TO THE DECISION AND REPORT ON OBJECTIONS OF ADMINISTRATIVE LAW JUDGE LANA H. PARKE

Exception	Page:Line	Record	Grounds
1. To the ALJ's finding that Respondent in both policy and practice was committed to interviewing employees accused of misconduct and obtaining an employee's explanation prior to imposition of discipline.	5:5-7	Tr. 334:22-25; 335:6-11; 415:4-14; GC Ex. 14.	The ALJ failed to consider the uncontradicted testimony of Angie Sandoval and Tracey Reilly, and the language of the progressive discipline policy itself, which clearly establish that these actions are not required in every situation and may be ignored in circumstance such as those that exist in this case.
2. To the ALJ's inaccurate description of what the CD shows of the incident between Xonia Trespalacios and Yolonda Flores.	6:5-14	Resp. Ex. 1.	The CD, which can be independently viewed by the Board, clearly shows Ms. Trespalacios pushing and bumping Ms. Flores.
3. To the ALJ's failure to consider the uncontradicted evidence that Ms. Trespalacios attempted to intimidate Ms. Flores via a telephone call.	_____	Tr. 232:18-233:23; 112:25-113:2; 114:12-22.	The phone call sheds light on the later incident captured on the CD and supports the testimony that Ms. Trespalacios pushed and bumped Ms. Flores.
4. To the ALJ's statement that Ms. Reilly acknowledged that she had not followed the Company disciplinary policy in three particulars.	7:11-15	Tr. 367:12-23; 334:22-25; 335:6-11; 415:4-14; 427:17-21; GC Ex. 14.	The ALJ's categorization is misleading in that Ms. Reilly testified that she concluded that she had all information she needed to make her decision; did not need additional statements and did not feel the need to interview Ms. Trespalacios in view of what she saw on the CD. Moreover, the disciplinary procedure allows for the exercise of discretion as the circumstances warrant.

Exception	Page:Line	Record	Grounds
5. To the ALJ's discussion and conclusion that the fact that Ms. Trespalacios' version of the incident is inconsistent with the camera footage is irrelevant.	7:35-50	Tr. 65:4-18; 344:23-345:13; Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	It is of critical importance that the alleged discriminatee lied about the incident that caused her termination, particularly in view of the testimony of the victim of the assault that she had been pushed, bumped and threatened by Trespalacios and these facts were before the decision maker. Further, Trespalacios' description of the incident which was inconsistent with the camera footage shows that Ms. Reilly's decision to terminate Ms. Trespalacios based on what she saw on the CD would not have changed had she interviewed Trespalacios and received the same incredible description of the events directly from her.
6. To the ALJ's failure to find that the script read to employees stated, "I want you to know that you're all free to have your own opinions about the union or anything else without worrying that someone else is going to abuse you because you disagree with them..."	8:15-40	GC Ex. 4	The ALJ ignored key language in the script of the speech which undermines the ALJ's finding that the speech establishes union animus.

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7. To the ALJ's analysis and finding that Rules 11 and 12 are impermissibly broad, could reasonably be interpreted as requiring management's permission before engaging in protected, concerted activity, thereby abrogating Section 7 rights in violation of Section 8(a)(1) of the Act.	10:7-22	Jt. Ex. 1, Ex. C.	Rules 11 and 12 cannot be reasonably interpreted as requiring management's permission before engaging in protected activity.
8. To the ALJ's analysis and finding that Rule 28 prohibiting soliciting of contributions can be reasonably construed to prohibit protected solicitations and thus chill protected activity in violation of Section 8(a)(1) of the Act.	10:24-36	Jt. Ex. 1, Ex. C.	The actual language of Rule 28 does not prohibit protected solicitations and cannot reasonably be interpreted to do so.
9. To the ALJ's unwarranted and strained view that Rule 28 would prohibit solicitation of a financial donation to defray printing costs of protected literature.	10:48-49	Jt. Ex. 1, Ex. C.	The ALJ's incorrect interpretation stretches the rule beyond reasonable bounds to find a violation where none exists.
10. To the ALJ's analysis and finding that Rule 33 is presumptively invalid without going further to consider the undisputed fact the rule was not interpreted or enforced so as to prohibit distribution on non-work time and in non-work areas and that employees	10:38-43	Jt. Ex. 1, Ex. C; 31:13-33:9.	The ALJ finds Rule 33 to be presumptively invalid without considering evidence that rebuts any such presumption.

Exception	Page:Line	Record	Grounds
openly distributed union flyers to management on company property before work.			
11. To the ALJ's analysis and finding that Rule 35 dealing with the inability or unwillingness to work harmoniously with other employees is so imprecise as to encompass protected discourse or interaction and that employees could reasonably construe the rule to prohibit Section 7 activity in violation of Section 8(a)(1) of the Act.	11:1-6	Jt. Ex. 1, Ex. C.	Rule 35 cannot be reasonably construed to prohibit protected activity.
12. To the ALJ's analysis and finding that the company's arbitration clause violates Section 8(a)(1) because it would be reasonably understood by employees to require utilization of the arbitration procedures instead of filing charges with the Board.	11:25-31	Jt. Ex. 1, Ex. A.	The ALJ ignores the language of the arbitration agreement that limits it to claims that may be lawfully resolved by arbitration. Nor does the agreement restrict employees from filing NLRB or other administrative charges.
13. To the ALJ's finding that the most tenable inference to be drawn from the CD is that Ms. Trespalacios innocuously patted and nudged Ms. Flores' shoulder as the two women spoke and later bent toward Ms. Flores with folded arms to whisper in her ear, jogging her shoulder	11:43-52; 12:1-4	Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8; Tr. 234:12-240:3; 242:20-243:7.	The ALJ's interpretation and description of this CD is plainly wrong. It does not show innocuous patting, whispering in Ms. Flores' ear or inadvertent jogging of Ms. Flores. Consistent with the testimony of Ms. Flores, the CD shows Ms. Trespalacios pushing and intentionally bumping Ms. Flores. Also, in coming to her inaccurate interpretation

Exception	Page:Line	Record	Grounds
inadvertently in the process; that the footage is susceptible to two interpretations; that the camera footage alone cannot justify a conclusion that Ms. Trespalacios hostilely pushed Ms. Flores and bumped her; that Respondent could not have unequivocally determined the tenor of the interchange solely by viewing the CD, incorrectly implying that it did so; that it follows that Respondent had to fully examine the circumstances surrounding the interchange, incorrectly implying that it did not do so.			and description of the events depicted on the CD, the ALJ ignores the statements submitted to Ms. Reilly stating that Ms. Flores was pushed, bumped and threatened with the loss of her job or that Trespalacios threatened to kick her ass, or kick her ass out.
14. To the ALJ's finding that the course of action Respondent took was the antithesis of a full examination of the circumstances; that Ms. Reilly failed to follow established policy, took no steps to ascertain whether Ms. Trespalacios had been given notice of the consequences of her behavior, and did not consider whether the conduct was a major or minor problem, an isolated incident or a recurring problem.	12:6-15	Tr. 334:22-25; 335:6-11; 415:4-14; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1. Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	Ms. Reilly conducted a reasonable investigation that enabled her to make an informed decision to terminate Ms. Trespalacios. The ALJ's finding that Ms. Reilly failed to follow established policy is wrong and in any event the policies cited by the ALJ as allegedly not followed are obviously ones that ordinarily would not be followed and are inapposite in the context of this event.

Exception	Page:Line	Record	Grounds
15. To the ALJ's finding that the investigation was inadequate and hasty; and the ALJ's unwarranted reliance on immaterial and incomplete facts to draw an inference of animus.	12:17-23	Tr. 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1; 381:4-25; 422:3-11; 334:22-25; 335:6-11; 415:4-14. Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	The investigation was neither inadequate nor hasty.
16. To the ALJ's apparent reliance on Ms. Reilly's statement that she knew of no violence toward union supporters since the election petition was filed yet told employees that threats of physical harm against employees was worsening, to infer anti-union animus.	12:28-32	Tr. 432:2-433:22.	ALJ drew an unreasonable inference of animus from the answer to a question intentionally limited in its timeframe; nevertheless the statement was true. The ALJ improperly inferred animus from a lawful statement. The inference drawn by the ALJ is not permitted under Section 8(c) of the Act. Ms. Reilly's speech to employees stated that 2SFG had to terminate another employee for threats against union non-supporters. While Ms. Reilly testified that her knowledge about this incident was limited, she knew this individual was the subject of a ULP charge. Petitioner's Counsel asked why Ms. Reilly felt that things were getting worse, and Ms. Reilly began to testify that the atmosphere at the factory was getting heated as the election was coming

Exception	Page:Line	Record	Grounds
			near, but petitioner's counsel interrupted and never gave Ms. Reilly a chance to complete her answer. Ultimately, the ALJ misunderstood Ms. Reilly's testimony and the ALJ erroneously inferred animus based on that misunderstanding.
17. To the ALJ's finding that Ms. Reilly's stated aim of making employees understand that they should work together reveals an antipathy for employee discord that goes beyond reasonable workplace concerns and encompasses protected employee interactions that are common during union campaigns.	12:32-35	GC Ex. 4.	ALJ's interpretation of lawful remarks is unreasonable and contrary to what was actually said. The remarks do not show antipathy for protected activities. The ALJ's finding is not permitted under Section 8(c) of the Act.
18. To the ALJ's statement that Ms. Reilly did not assure employees that Respondent would respect the rights of employees to campaign for the union	12:35-37; 13:1	GC Ex. 4; Tr. 363:16-20.	The ALJ's statement is wrong. Ms. Reilly did state that Respondent would respect the rights of all employees, regardless of their union views.
19. To the ALJ's finding that Ms. Reilly's stated aim and warning reveal animus toward vigorously expressed union support.	13:1-2	GC Ex. 4.	This is an unwarranted and improper finding based on the evidence and is not permitted under Section 8(c) of the Act.
20. To the ALJ's finding that as the CD footage shows, at most, ambiguous behavior, its presentation as an example of conduct that could provoke termination also reveals	13:2-5	Resp. Ex. 1; GC Ex. 4; Tr. 103:7-22; 424:3-13.	The CD does not show ambiguous behavior. The ALJ ignores testimony of witnesses who viewed the CD. The showing of the CD does not reveal animus toward protected activity and the

Exception	Page:Line	Record	Grounds
animus toward forceful but protected union activity.			contemporaneous speech states directly the contrary. The ALJ's finding is not permitted under Section 8(c) of the Act.
21. To the ALJ's summary of conduct which requires an inference of discriminatory motive.	13:7-13	Tr. 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:9; 367:12-23; 335:6-11; 415:4-14; 427:17-21. GC Ex. 4, Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	The facts, inference and conclusion are wrong.
22. To the ALJ's conclusion that the General Counsel met her initial Wright Line burden and that the burden shifts to Respondent.	13:13-16	Tr. 334:22-25; 335:6-11; 415:4-14; 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1. Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	The General Counsel failed to prove animus.
23. To the ALJ's finding that Ms. Reilly did not have a reasonable belief that Ms. Trespalacios had committed an offense that merited termination.	13::21-23	Tr. 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1. Resp. Ex. 1, 2	The ALJ applied the wrong legal standard and ignored critical facts. Clearly Ms. Reilly has a reasonable belief that Ms. Trespalacios committed an offense warranting termination.

Exception	Page:Line	Record	Grounds
		(translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	
24. To the ALJ's finding that Respondent has neither justified Ms. Reilly's digression from practice and policy nor vindicated Ms. Reilly's extraordinary post-discharge employee presentation.	13:23-25	Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8; GC Ex. 14; Tr. 334:22-25; 335:6-11; 415:4-14; 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1.	The ALJ ignored key evidence in this regard.
25. To the ALJ's finding that the only rational explanation is that Respondent was motivated by a desire to quell employee union support and generally to impede the union organizational drive.	13:25-27	Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8; GC Ex. 14; Tr. 334:22-25; 335:6-11; 415:4-14; 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1.	ALJ's finding is wrong, speculative, contrary to the record evidence and unjustified.
26. To the ALJ's finding that Respondent has not met its burden under Wright Line and that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Trespalacios.	13:27-29	Tr. 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:1. Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3	Respondent met its burden. Ms. Reilly had more than a reasonable belief that Trespalacios engaged in a terminable offense.

Exception	Page:Line	Record	Grounds
		(translated in Tr. 242:9-19), 8.	
27. To the ALJ's unsupported and incorrect statement that the absence of an 8(a)(1) allegation regarding Ms. Reilly's presentation does not prevent her from considering it as evidence of animus.	13:44-45	GC Ex. 4.	The ALJ is wrong factually and legally. Section 8(c) of the Act does not permit statements that do not contain a threat of reprisal or force or promise of benefit to be used as evidence of an unfair labor practice.
28. To the ALJ's failure to consider Respondent's evidence that it would have discharged Trespalacios even in the absence of her union activities.	_____	Tr. 308:11-18.	The ALJ failed to consider evidence that Respondent had terminated another employee in similar circumstances.
29. To the ALJ's findings that the termination of Ms. Trespalacios interfered with the results of the election and that Ms. Reilly's statements would reasonably have the effect of discouraging employees protected activities and the ALJ's recommendation that Objections 4 and 37 be sustained.	15:10-23	Tr. 367:12-23; 344:23-345:13; 347:13-18; 351:10-24; 353:11-16; 359:7-360:9; 103:7-22. Resp. Ex. 1, 2 (translated in Tr. 222:1-9), 3 (translated in Tr. 242:9-19), 8.	The ALJ's finding that the termination of Trespalacios was unlawful is wrong and not supported by the record.
30. To the ALJ's recommendation that Objections 4 and 37 be sustained and the election be set aside.	21:48-51		The premises for the recommendation are wrong.
31. To the ALJ's recommended Notice of Second Election.	22:1-20		The election should not be set aside.

Exception	Page:Line	Record	Grounds
32. To the ALJ's Conclusions of Law that Respondent violated Section 8(a)(1) and (3) of the Act and interfered with the holding of a fair election.	22:27-38		The conclusions of law are wrong.
33. To the ALJ's recommended remedy.	22:41-44 23:1-10		As there were no unfair labor practices there should be no remedy.
34. To the ALJ's recommended Order.	23:12-44 24:1-15		As there were no unfair labor practices there should be no Order.
35. To the ALJ's recommended Notice to Employees.	Appendix		As there were no unfair labor practices there should be no Notice to Employees.

Dated: July 23, 2010

Respectfully submitted,

By: _____

Alan R. Berkowitz
Catherine D. Lee
Attorneys for Respondent
2 SISTERS FOOD GROUP, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2010, I caused copies of the

RESPONDENT'S EXCEPTIONS TO THE DECISION AND REPORT

ON OBJECTIONS OF ADMINISTRATIVE LAW JUDGE LANA H. PARKE to be

served on the following parties by U.S. Mail:

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Dated at San Francisco, California, this 23rd day of July, 2010.

Anna Lee

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

2 SISTERS FOOD GROUP, INC.,	)	Case Nos. 21-CA-38915
	)	21-CA-38932
and,	)	
	)	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167	)	
	)	
	)	
2 SISTERS FOOD GROUP, INC.	)	21-RC-21137
Employer	)	
	)	
and,	)	
	)	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1167	)	
	)	
Petitioner	)	
	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND REPORT ON OBJECTIONS OF ADMINISTRATIVE LAW JUDGE LANA H. PARKE

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STATUTES

I. INTRODUCTION

This case arises out of an organizing campaign at 2 Sister's Food Group, Inc. ("Respondent/Employer") by United Food and Commercial Workers International Union, Local 1167 ("the Union"). The Union lost the election, 66 ballots cast for the Union and 87 against. The Union filed 53 objections to the election of which 51 were overruled or withdrawn. The only objections sustained by the Administrative Law Judge are those based upon her erroneous conclusions that the termination of Xonia Trespalacios was unlawful and that the speech concerning Ms. Trespalacios' termination had the effect of discouraging employees' protected activities.

The ALJ found Respondent unlawfully terminated Xonia Trespalacios because of her Union activity; however, the ALJ's conclusion is based upon a flawed *Wright Line* analysis, inferences that are contrary to well established Board law, and improper reliance on speech protected by Section 8(c) of the Act to find animus.

Finally, the ALJ found that various rules of conduct and an arbitration agreement maintained by the Employer violated Section 8(a)(1) of the Act because they could reasonably be interpreted to prohibit protected activity. To reach this erroneous conclusion ALJ stretches reasonable interpretation beyond reasonable bounds.

II. THE TERMINATION OF XONIA TRESPALACIOS

Ms. Trespalacios was terminated as a result of an incident between her and fellow employee Yolanda Flores. As discussed more fully below, on Thursday, July 9, 2009, a supervisor reported to Vice President of Operations, Tracey Reilly, that Trespalacios had "pushed and abused" Ms. Flores in the lunch room. (Tr. 344:23 - 345:13) Ms. Reilly instructed the supervisor to obtain statements from witnesses. The following day, Friday, July 10, Ms. Reilly received and read four statements which cumulatively stated that Trespalacios pushed

Flores and threatened to have her fired when the Union came into the plant. (Tr. 346 -351) In addition Ms. Reilly reviewed security footage of the incident that shows Trespalacios pushing Flores numerous times with sufficient force to cause her body to be moved to the side, waiving her finger in Ms. Flores face and bumping Ms. Flores with her arms folded across her chest. (Tr. 351:15 - 352:1; 359: 7- 360:1; Resp. Ex. 1) The following Monday, July 13, 2009, Ms. Reilly terminated Trespalacios. (Tr. 360:14-17)

Ms. Trespalacios was an open Union supporter who engaged in various union-organizing activities including the distribution of pro-Union flyers before work on Company premises. Indeed, Ms. Trespalacios handed pro-Union flyers to Tracey Reilly on several occasions. (ALJD 5:35-45).[1] Ms. Reilly readily admitted that she was aware that Ms. Trespalacios was a Union supporter. (TR. 360). On these facts the Administrative Law Judge found that the General Counsel met the first and second elements of the *Wright Line* burden - that Ms. Trespalacios engaged in union activities and the Employer was aware of that fact. (ALJD 11:35-38).

The ALJ also correctly found no direct evidence of employer animus toward Ms. Trespalacios' union activities or to employee union support generally. Accordingly, "any finding that Respondent had a discriminatory motive in discharging Ms. Trespalacios must be

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[1] The ALJ concluded that the Company's Rule 33 prohibiting distribution of printed matter on Company premises without permission is presumptively invalid because it necessarily includes distribution of protected material on non-working time and in non-working areas. (ALJD 10:38-42). However, the ALJ, failed to recognize that any presumption of illegality has been overcome. First there is no evidence that the Rule was ever enforced in an unlawful manner. Second, employees openly engaged in the distribution of pro-Union literature in non-work areas during non-work time in the presence of management and were not instructed to stop. (TR. 30:2 to 33:9). The evidence shows that the rule did not, in fact, restrain employees in the exercise of their Section 7 rights.

inferred from circumstantial evidence and the record as a whole." (ALJD 11:37-41). But, in her quest to find circumstantial evidence of animus the ALJ completely misapplies the *Wright Line* test, draws improper inferences and impermissibly relies on statements protected by Section 8(c) of the Act.

A. The ALJ Did Not Properly Analyze the Termination of Trespalacios under Wright Line

Under *Wright Line*, the General Counsel must first make a prima facie showing "sufficient to support the inference that protected conduct was a motivating factor in the employer's decision" to take the action which allegedly violated Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083, 1089 (1980). "Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. In cases further defining the *Wright Line* test, the Board has consistently held that "an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that they acted on that belief when it discharged him." *In Re McKesson Drug Company*, 336 NLRB 935, 938 n.7 (2002). *See also Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) in which the Board affirmed the ALJ's finding that, "based in part on reports which Respondent's management considered in making the discharge decision, Respondent had a reasonable, good faith belief that the three employees had engaged in the misconduct ..." Id. at 1108. The Board again confirmed that it is not necessary for a respondent to prove that the misconduct actually occurred to meet its burden under *Wright Line*. *Affiliated Foods* cites *GHR Energy Corp.*, 294 NLRB 1011 (1989) for the proposition that respondent met its *Wright Line* burden where it reasonably believed that employees had engaged in serious misconduct. Id. at 1012-13.

In this case the ALJ failed to look at key facts to determine whether Tracey Reilly had a reasonable belief that Ms. Trespalacios had engaged in misconduct based on the evidence before her when she made the decision to terminate. Instead, the ALJ improperly attempted to examine and decide what actually happened during the incident between Ms. Trespalacios and Ms. Flores. (ALJD 11:45-50) The Board has made it clear that this is not the role of the ALJ. See *Chinese Dailey News*, 346 NLRB 906 (2006) in which the ALJ noted " I am not deciding and the parties are not arguing whether or not Zhang did in fact engage in the misconduct." Id. at 946. Thirty years of Board cases following *Wright Line* make it abundantly clear that it is not necessary for Respondent to prove that the misconduct actually occurred. Indeed, the Respondent's reasonable belief may turn out to have been wrong, but that does not change the analysis or the result. See *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge employee for any reason, whether or not just, so long as it is not for protected activity). See also *Akal Security, Inc.*, 354 NLRB 1 (2009) in which the Board reversed Judge Parke on the ground that respondent had a good faith belief that employees engaged in misconduct. If the facts before the decision maker are sufficient to establish a reasonable belief that the employee engaged in misconduct, Respondent meets its burden of proof. The obvious corollary to this proposition is that it is improper for the ALJ to attempt to determine what actually occurred and to substitute her interpretation of the event in question for the required analysis of whether the facts before the

decision maker led to a reasonable belief that the employee engaged in misconduct. Yet this is what the ALJ did here.[2]

The proper analysis under *Wright Line* requires the ALJ, and now the Board, to determine whether Tracey Reilly had a reasonable belief that Ms. Trespalacios had pushed, bumped and threatened Ms. Flores. The facts found by the ALJ (but not properly analyzed by her) are more than sufficient to establish that Ms. Reilly reasonably believed that Ms. Trespalacios engaged in misconduct warranting her termination. As found by the ALJ:

- On the day of the incident, supervisor Veronica Vega reported to Ms. Reilly that Ms. Trespalacios "had pushed and abused Ms. Flores." (ALJD 6:21-22). (This report alone provides a reasonable basis for believing that Trespalacios had engaged in misconduct.)

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[2] After reviewing the CD of the incident in question the ALJ found that "the most tenable inference to be drawn is that Ms. Trespalacios innocuously patted and nudged Ms. Flores' shoulder as the two women spoke and later bent toward Ms. Flores with folded arms to whisper in her ear, jogging her shoulder inadvertently in the process." (Emphasis added) First, the ALJ's "inference" of what is shown on the CD fails to take into account the facts that Ms. Reilly had when she reviewed the CD. As described in the text that follows, before Ms Reilly reviewed the security footage she read the witness statements that state that Trespalacios had abused and pushed Flores. Having been so informed Ms. Reilly reviewed the security footage and determined that it supported the witness statements. Second, a review of the CD by the Board will reveal that the Judge's categorization of the pushing as "innocuous patting" and "inadvertent" jogging of Flores shoulder while whispering in her ear, is totally without foundation. Finally, the ALJ's distorted description of the event is inconsistent with the testimony of Ms. Flores which was not discredited. Flores testified that Trespalacios came to the table where she was sitting and when Trespalacios turned to her "her face was not pleasant." (Tr. 234: 17-18) Trespalacios started cursing at Flores stating that she didn't know what was good for people and that she was "stupid." (Tr. 234: 19 - 236:3) Trespalacios was pointing and shaking her finger in "an admonitory fashion" very close to Ms. Flores nose. (Judge Parke's description of a demonstration of the event Tr. 238:10-12: 236:8-10) Trespalacios then "pushed Flores five times - "hard." (Tr. 238:15-25). Trespalacios briefly walked away, came back and with arms folded in front of her "forcefully" pushed Flores with her body. (Tr. 239: 6-16)

- Ms. Reilly told Ms. Vega to obtain written statements from witnesses. The following day Ms. Vega provided Ms. Reilly with statements from herself, Ms. Avila, Ms. Flores, and Ms. Vicente. (ALJD 6:22-24)
- Ms. Avila's statement says, "Yolanda Flores coming from the lunch room and told me that a lady from poultry had told her a bad word and had pushed her." (sic.) (ALJD 6:45-46)
- Ms. Vega's statement says, "Xonia Trespalacios pushed her [Flores] and told her that when the Union comes in, she will be fired with a kick up her ass...Yolanda tells me she feels really uncomfortable with the things Xonia Trespalacios told her. (ALJD 7:3-6)
- Ms. Flores statement says, "..[S]he [Trespalacios] told me that she was going to kick my ass out and throw me away and she pushed me. And I am very upset for what she told me." (ALJD 6:25-29)
- Ms Vicente statement says, " Xonia approached Yolanda touching her on the shoulder. And Yolanda told her, 'Are you angry because I don't support your Union?' " (ALJD 6:39-40)
- Ms Reilly reviewed the statements given to her by Ms. Vega and viewed the security camera footage of the incident 5 to 7 times and decided to terminate Ms. Trespalacios. (ALJD 7:18-23)

Despite the fact that Ms. Reilly had been orally advised by Ms. Vega that Ms. Flores had been "pushed and abused" by Trespalacios, had read statements from witnesses stating that Trespalacios had pushed Ms. Flores and had threatened to have Flores fired when the

Union came in, and, the fact that Ms. Reilly had reviewed the CD footage of the incident 5-7 times which confirmed the pushing and shoving which was even more extensive than described in the statements, the ALJ incredibly found that Ms. Reilly did not have a reasonable belief that Ms Trespalacios had committed an offence that merited termination! Based on these facts it cannot be fairly concluded that Ms. Reilly did not have a reasonable belief that Trespalacios engaged in misconduct.[3]

B. The ALJ Incorrectly Infers Animus From Purported Investigation Deficits and Disciplinary Haste

The ALJ wrongly disregarded Ms. Reilly's reasonable belief that Trespalacios had engaged in misconduct because of the following "deficits" in the investigation: Ms. Reilly did not obtain Trespalacios version of events; rejected "without explanation" Ms. Vicente's contradictory account of the incident; failed to follow various policies; did not have a statement from one other employee who was present during the incident; and, made the decision to terminate Trespalacios in "disciplinary haste." (ALJD 12:5-23) The ALJ is wrong on every point. The so called "deficits" found by the ALJ are either legally wrong or inconsequential. And, most importantly, these "deficits" do not change the fact that Ms. Reilly had more than ample evidence that Ms. Trespalacios had engaged in misconduct at the time she made the decision to terminate her.

The ALJ relies heavily on the fact that Ms. Reilly did not ask Ms. Trespalacios for her version of the incident. But, as clearly explained by Ms. Reilly, she did not deem it

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[3] Interestingly, the ALJ cites *McKesson Drug Co., supra,* a case in which Respondent had no evidence that the employee had violated any "law regulation or policy or that the Respondent reasonably believed that he had done so." *McKesson, supra* at 937. That case is clearly not apposite here.

necessary to interview Ms. Trespalacios because, "I had the evidence, the three statements that I had and also I had the video evidence. There was nothing I needed to know anymore than what I can see." (TR. 367, 427). Moreover, it is reasonable to assume that if Ms. Reilly had interviewed Ms. Trespalacios she would have told Ms. Reilly the same untruthful story that she related on the witness stand which Ms. Reilly would have been justified in ignoring or discrediting. Ms. Trespalacios denied waving her finger in Ms. Flores' face, said she touched Ms. Flores only once, denied bumping her with her arms crossed, said she only touched Ms. Flores softly on the shoulder, denied that her touching of Ms. Flores caused her body to move – all of which is belied by the CD footage of the incident. (TR. 65:24-66:1-23).[4]

Even if Ms. Reilly had asked Ms. Trespalacios to describe the incident, Ms. Reilly would have been entitled to reject her version as being inconsistent with what she saw on the CD "with her own eyes" and what she had read in the statements submitted by other employees. (See *Eldorado, PCC Specialty Prods., Inc.,* Case 34-CA-7674, 1997 WL 33316084 (Dec. 31, 1997) in which the ALJ commented on the respondent's failure to obtain the employee's version of the incident or to interview a potential witness to a threat. "One can assume that [the subject employee] would have denied making the threat and that [the witness] would have answered in the same manner he did at the hearing...") In fact, in a case very much like this, an administrative law judge held "that it was not incongruent for respondent to discharge [employee] without first confronting him with his actions or subjecting him to progressive discipline" as it had a reliable

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[4] Although the ALJ attempts to minimize the fact that Trespalacios' version of the incident "is not fully consistent with the camera footage" (ALJD 7:48-52), the truth is that the testimony was completely contrary to what is clearly shown on the CD. Ms. Trespalacios' implausible and unsubstantiated explanation for the contradiction between what is shown on the CD and her testimony was that the video had been altered. (TR. 65:21-25; 66-69)

report of the employee's misconduct which was corroborated by a video tape. *Cent. Freightlines, Inc.*, 2002NLRB Lexis 146, at*20-*21 (Apr. 2002). In sum, Ms. Reilly's decision not to interview Ms. Trespalacios in view of the reliable reports that she had read, which were confirmed by what she was able to observe on the CD, was simply a sound judgment, rather than evidence of discriminatory motive. *Society to Advance the Retarded & Handicapped, Inc.*, 324 NLRB 314, 315 (1997) (dismissing complaint despite respondents decision to discharge employee without confronting him, noting that from this omission "it does not necessarily follow that the reason was grounded in antiunion animus."); *Sara Lee,* 348 NLRB 1133 (2006) in which Judge Parke held that "interviewing the subject employee is not a requirement for an adequate investigation..." Indeed it is not - particularly in the circumstances of this case.

The ALJ further faults Ms. Reilly for not obtaining "accounts from all witnesses to the incident" and rejecting "without plausible explanation, Ms. Vicente's eyewitness account, which contradicted in material part Ms. Flores' accusations..." (ALJD 12:9, 20-21). The ALJ found that these "deficits" strongly suggest animus. They do not.

First, with respect to the absence of a statement from Ms. Castillo, the one other employee who was present during the incident, ALJ ignores the fact that when Ms. Reilly was first told of the incident by Ms. Vega, she instructed Ms. Vega to take statements from "any of the witnesses that was around the area.(sic.)" (TR. 344:23-345:13). The record does not reflect why Ms. Vega did not obtain a statement from Ms. Castillo. Certainly there is nothing to even suggest that Ms. Reilly did or said anything to Ms. Vega indicating that she should not interview Castillo. In fact it is clear from the record that at the time she reviewed the CD and the statements that had been given to her, Ms. Reilly did not know the identity of the other person at the table during the incident. (Tr. 408:13-21) Ms. Reilly reviewed all of the statements that were

provided to her. The statements she reviewed and the security footage of the incident gave Ms. Reilly a reasonable basis for making her decision. A statement from an additional witness either confirming or denying the misconduct would have been superfluous particularly as Ms. Reilly had the ability to observe Ms. Trespalacios conduct herself by viewing the security footage.[5] See, *Sara Lee, supra*, holding that respondent did not violate Sect. 8(a)(3) of the Act by discharging employee, noting that while every potential witness was not interviewed there was no evidence that respondent sought to shape or distort its inquiry or engaged in sham fact gathering; *Bonanza Aluminum Corp.,* 300 NLRB 584, 590 (1990) (fact that employer did not interview all possible witnesses does not raise an inference of unlawful conduct.); *Detroit Newspaper Agency,* 342 NLRB 223, 302 (2004) (As video tape of the incident was available to the respondent, it was unnecessary to interview all witnesses and failure to do so does not establish that investigation was insufficient.)

Second, the ALJ's gratuitous statement that Ms. Reilly rejected Ms. Vicente's eyewitness account "without plausible explanation" is unjustified. Initially it should be noted that the judge's statement suggests that Ms. Reilly was asked why she rejected Ms. Vicente's account of the incident but was unable to provide a plausible explanation for doing so. In fact, Ms. Reilly was never asked why she rejected Ms. Vicente's account. Nevertheless, the answer is obvious. Ms. Vicente's statement says, "Sonia approached Yolanda touching her on her shoulder" but

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[5] It is also important to note that in the termination of Jesus Guzman who was also fired for pushing a fellow employee (Ryan Maher), Respondent did not interview all witnesses to the incident. The email "incident report" by Mr. Maher identifies Veronica Vega as a witness to the incident. (Resp. Ex. 4) But Ms Vega was not interviewed and did not provide a statement. (Tr. 315:12-21) Thus, no inference of discriminatory motive can be drawn from the failure to obtain a statement from Ms. Castillo.

does not address the pushing or bumping that is clearly shown on the CD.[6] Whether this was an unintentional omission by Ms. Vicente or an attempt to deny any misconduct on the part of Ms. Trespalacios, Ms. Reilly was certainly entitled to rely upon what she observed on the CD and to reject the statement of Ms. Vicente to the extent that it was an incomplete or unreliable description of the incident. (*Merillat Indus., Inc.*, 307 NLRB 1301, 1303 (1992) (Respondent's defense does not fail simply because not all of the evidence supports, or even because some of the evidence tends to negate it.") In sum, the ALJ was unjustified in concluding that Ms. Reilly rejected Ms. Vicente's statement "without plausible explanation." The explanation is self evident and in any event she was entitled to rely on the other evidence before her, including her own observation of the event on the security footage.

Ms. Reilly was correct in not relying on Ms. Vicente's written statement over that of Ms. Flores. At the hearing Ms. Vicente admitted that she did not hear all of the conversation between Trespalacios and Flores because she was talking with Ms. Castillo during much of the incident. Further, she testified that she was surprised that the video showed that Trespalacios "was pushing her like so, strongly." She further admitted that the CD showed that Trespalacios was "making aggressive hand gestures" to Flores and that "Ms. Trespalacios was pushing Ms. Flores, Yolanda, aggressively." (TR. 103:1-22). Thus, the testimony of Ms. Vicente, which the ALJ ignores, confirms that the video tape shows Trespalacios strongly pushing and making aggressive hand gestures to Ms. Flores, all of which was also observed by Ms. Reilly and contributed to her reasonable belief that Ms. Trespalacios engaged in misconduct.

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[6] The ALJ incorrectly asserts Vicente's statement contradicted Ms. Flores' accusations in material part. It doesn't. It does not deny the misconduct. It simply does not address it.

In addition to faulting respondent for the purported investigation deficits described above, the Administrative Law Judge further notes that Ms. Reilly "took no steps to ascertain whether Ms. Trespalacios had been given notice of the consequences of her alleged behavior.. " and did not evaluate whether the alleged conduct was a major or minor problem. (ALJD 12: 12-15). The ALJ apparently concluded that because Ms. Reilly did not seek to ascertain whether Ms. Trespalacios had notice that pushing, bumping and threatening employees might result in termination, or evaluate whether the conduct was a major or minor problem, strongly suggests animus. This is a facially unsupportable conclusion. Although an employer's failure to follow its own policies may be evidence of unlawful motive, it is clearly not conclusive. *Cadbury Beverages, Inc.*, 324 NLRB 1213, 1221 (1997); *McLean Roofing Co.*, 276 NLRB 830 (1985);.*Fast Food Merchandisers*, 291 NLRB 897 (1988). Indeed, the policies cited by the ALJ here are so inconsequential that the failure to follow them can not support an inference of unlawful motive. This is not a situation in which an employee is accused of violating a rule that is unusual or unique to Respondent where notice of the rule is an important consideration in determining whether the employee was aware that what she is doing was improper. Here, even in the absence of a rule, Respondent could reasonably expect that Ms. Trespalacios would know that pushing, shoving, threatening or otherwise attempting to intimidate fellow employees is unacceptable workplace conduct that will result in discipline, including termination.

Also, contrary to the ALJ's unfounded assumption that Ms. Reilly did not consider the available evidence to evaluate whether the conduct was a major or minor problem, she obviously did. As Ms. Reilly testified, she viewed Ms. Trespalacios's conduct as a serious offense warranting termination. The ALJ's drawing an inference of unlawful motive from Ms.

Reilly's purported failure to follow these disciplinary rules cannot be sustained. Such an inference is simply not reasonable in this context. *Carleton College v. NLRB*, 230 F.3d 1075, 1080 (8th Cir. 2000) ("Although the Board is permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence, it cannot rely on suspicion, surmise, implications, or plainly incredible evidence.") (citation omitted).

Finally, the ALJ finds, without explanation, that "disciplinary haste" strongly suggests animus. (ALJD 12:23). It is not clear what the ALJ means by disciplinary haste. Ms. Reilly learned of the incident on Thursday afternoon, July 9, and instructed Ms. Vega to conduct an investigation and obtain statements from witnesses. The following day, she received and reviewed the statements provided to her by Ms. Vega and reviewed the security footage of the incident a number of times. Indeed, she studied the security footage, pausing it to examine various aspects of the incident. (TR 430). By approximately 3:00 p.m. that afternoon, Ms. Reilly decided to terminate Ms. Trespalacios who by that time had left work for the day. (TR 420). The termination in fact took place the following Monday morning. This is hardly "disciplinary haste". By the time Ms. Reilly made her decision to terminate Ms. Trespalacios, Ms. Vega had conducted an investigation, obtained statements from witnesses, and Ms. Reilly had spent substantial time reviewing the security footage of the incident. Ms. Reilly had all the information she believed she needed to make an informed decision. There is nothing in the record to suggest haste or that Respondent intentionally skipped any necessary steps in the investigation in order to come to a quick conclusion.

C. The ALJ Committed Reversible Error By Inferring Animus From Conduct And Speech Protected By Section 8 (c) of the Act

The ALJ committed serious error by inferring animus from Respondent's showing the CD of the Trespalacios/Flores incident to the employees at the plant and Ms. Reilly's speech

to the employees concerning the incident. (ALJD 12:25-13:30). Neither the CD shown to the employees nor the speech given by Ms. Reilly contained a threat of reprisal or force or promise of benefit. Nevertheless, Judge Parke finds them to be evidence of unlawful motive in the termination of Ms. Trespalacios in clear and direct contravention of the prohibitions of Section 8(c) of the Act. Section 8(c) states: "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal, or force, or promise of benefit."

In an apparent attempt to transform protected Section 8(c) speech into evidence of unlawful animus, the ALJ distorts and reinterprets what was actually said to employees and then uses her interpretation of the speech to infer anti-union animus. For example, the ALJ found that Ms. Reilly's "stated aim of making employees understand that they should work together, not against each other, reveals an antipathy for employee discord that goes beyond reasonable concerns and encompasses the robust, vigorous, and protected employee interactions that are common during union campaigns." (ALJD 12:32-35). What Ms. Reilly said was, "being divided over the union question is getting in the way of us working together in peace, and that troubles me. I am asking you all to please put aside your feelings on the union question and work together to make this a place we can all be proud of." (GC Ex. 4). The ALJ grossly distorts the speech to find "an antipathy for employee discord that goes beyond reasonable workplace concerns." The entire speech is about not tolerating the mistreatment of coworkers who disagree on the union question.

Further, contrary to the ALJ's finding that "Ms. Reilly did not assure employees that the Respondent would respect the rights of employees to campaign enthusiastically for the

union.." (ALJD 12:35-36), Ms. Reilly assured employees that "I want you to know that you are all free to have your own opinions about the union, or anything else, without worrying someone else is going to abuse you because you disagree with them." (GC Ex. 4). Similarly, the ALJ's conclusion that Ms. Reilly's warning that she will not tolerate "the mistreatment some employees have shown their coworkers who disagree with them on the union question" as revealing animus towards vigorously expressed union support is entirely without foundation. Ms. Reilly's speech does not reveal animus towards lawfully expressed union support, whether vigorous or not. It warns only of assaulting and intimidating coworkers. She expressly stated, "I want you to know that you are all free to have your own opinions about the union, or anything else, without worrying that someone else is going to abuse you because you disagree with them.. . . . no one will be hassled or intimidated for having a different opinion from another employee. I will not allow that."

Finally the ALJ posits that since the CD footage shown to employees showed "at most, ambiguous behavior, its presentation as an example of conduct that could provoke termination also reveals animus towards forceful but protected union activity." (ALJD 13:3-5). First, the CD is not ambiguous at all, but rather shows Ms. Trespalacios's pushing, bumping and making aggressive hand gestures to Ms. Flores. Nevertheless any ambiguity as to what Ms. Reilly was concerned with was clarified by what she said: "the video clip is of an employee threatening, intimidating and physically assaulting another employee that used to be her friend because she changed her mind and decided to vote against the union." (GC Ex. 4). There is absolutely nothing in Ms. Reilly's speech which can reasonably be interpreted as revealing animus towards forceful but protected union activity.

The ALJ's heavy reliance on Ms. Reilly's post termination speech to employees to establish antiunion animus is reversible error. Even if Respondent took advantage of Ms. Trespalacios's misconduct to convey its view to employees that unions cause discord between employees which gets in the way of working together in peace, such an expression of opinion is fully protected by Section 8(c) of the Act. As clearly stated by the U.S. Supreme Court, "an employer is free to communicate . . . his general views about unionization . . . so long as the communications do not contain a 'threat of reprisal, or force or promise of benefit'". *NLRB v. Gissel Packing Co.*, 395 US 375, 618 (1969). Both the Board and the US Circuit Court of Appeals have consistently protected the free speech rights provided by Section 8(c) of the Act. See *Trailmobile Trailer, LLC*, 355 NLRB 95 (2004) in which the Board held that "the Act countenances a significant degree of vitupretous speech in the heat of labor relations." Even vituperative and demeaning remarks about a union or its officials are protected by Section 8(c). Nor does the mention of the possibility of violence or misconduct that might occur as a result of unionization remove the protection of Section 8(c). *Milford Plains L.P. d/b/a Hampton Inn*, 309 NLRB 942, 943 (1992); *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 709 (1992). In this case, the ALJ took lawful statements and expressions of opinion to support a finding of antiunion animus in an unfair labor practice proceeding. This is clearly improper. See *E.J., Medeco Sec. Locks, Inc. v. NLRB*, 142 F 3rd 733, 744 (4th Cir. 1998). ("Speech protected by [Section 8(c)] cannot be used by the General Counsel to establish an employer's antiunion animus . . . This impermissible result would completely undermine §8(c) by rendering its protection an empty promise.") See also *Bourne Manor Extended Care Facility v. NLRB*, 2001 WL 36025914 (1st Cir. 2001); *NLRB v. Lampi, LLC*, 240 F 3rd 931, 936 (11th Cir. 2001).

Significantly Judge Parke was previously reversed in a similar case in which she attempted to infer union animus from lawful Section 8(c) protected speech. *Sara Lee*, 348 NLRB 1133, 1134-1135 (2006). Similarly, in this case, Judge Parke's findings of animus are based on statutorily protected speech and conduct. The Judge's attempt to twist lawful statements condemning intimidation and physical assaults of one employee by another into expressions of anti-union animus threats is untenable.

In sum, the ALJ's finding of animus based on what she describes as "Ms. Reilly's extraordinary post-discharge employee presentation" cannot be sustained under Section 8(c) of the Act. The complaint with respect to the discharge of Ms. Trespalacios must be dismissed based on Respondent's good faith believe that she had engaged in misconduct and the lack of any evidence of specific or general animus directed toward Ms. Trespalacios or to employee union activity generally. At the very least, the ALJ should have considered the evidence produced by both the General Counsel and Respondent on the question of whether Respondent would have terminated Ms. Trespalacios for her misconduct in the absence of her union activity. For the reasons discussed above, the finding that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ms. Trespalacios must be reversed.

III. THE MAINTENANCE OF WORK RULES AND THE ARBITRATION AGREEMENT

A. Rule 11 (Leaving During Working Shift Without Supervisor's Permission) And 12 (Stopping Work Before Shift Ends Or Unauthorized Breaks)

The ALJ found that Rules 11 and 12 violated Section 8(a)(1) of the Act and were impermissibly overbroad. (ALJD 10:20-21). In support of her decision, the ALJ cited *Crowne Plaza Hotel*, which held that the rules regarding leaving work mid-shift without authorization were unlawfully overbroad. *Crowne Plaza*, 352 NLRB 382, 387 (2008). However, the *Crowne*

Plaza case also cited *Wilshire at Lakewood*, 343 NLRB 141 (2004), which recognized that a rule prohibiting walking off a shift without permission may be lawful in some contexts. *Id.* *The Wilshire at Lakewood* case demonstrates that the Board does not automatically bar rules regarding leaving mid-shift, but rather, looks at the context of the work environment to determine how employees would reasonably interpret the rules at issue. *See also Adtranz ABB Dailmer-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (C.A.D.C. 2001) ("[T]he Board should consider 'the realities of the workplace' and the actual context in which rules are imposed") (citing *Lafayette Park Hotel*, 326 NLRB 824 (1998)).

Here, an ordinary reading of the rules shows that their primary purposes are to maintain production, order and employee safety. Working men and women are likely to read the rules in context and understand their ordinary meaning. They would not read into them a prohibition against strikes or other protected activities. Although many legitimate work rules can be construed and argued by imaginative counsel to prohibit far more than their drafters ever intended, the Board should not be the "handbook police," examining work rules for possible unlawful construction. If work rules appear to serve a legitimate purpose and do not specifically prohibit protected activity the Board should not construe them to do so unless the employer attempts to enforce or interpret them in that manner. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

B. Rule 28 (Unauthorized Soliciting of Contributions On Premises)

Although the rule on its face is limited to the solicitation of "contributions", the ALJ found that Rule 28 is impermissibly overbroad and therefore violates Section 8(a)(1) of the Act. (ALJD 19:24-36). The ALJ stated, "Among other potentially overbroad applications of the rule, it would prohibit solicitation of a financial donation to defray printing costs of protected literature." (ALJD 10:48-49). Imaginative construction - yes. Reasonable construction - no.

The words of Rule 28 are limited to prohibiting solicitation of "contributions," charitable or otherwise. Though "the NLRB has itself cautioned against parsing workplace rules too closely in a search for ambiguity that could limit protected activity," the ALJ here does exactly that by imagining how this rule, which is lawful on its face, *could* limit protected activity. *See Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (C.A.D.C. 2001); *see also Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (noting that Board "will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). A reasonable employee reading this rule is not likely to construe it to prohibit Section 7 activity and there is no evidence to support the ALJ's speculative construction. *See Adtranz ABB Daimler-Benz Transp., N.A., Inc.*, 253 F.3d at 28 (holding that no-solicitation rule was lawful and stating that NLRB may not declare policies to be facially invalid without any supporting evidence).

C. Rule 33 (Distributing Printed Matter On Premises Without Permission)

The ALJ found that Rule 33 was presumptively invalid. (ALJD 10:37-42). The ALJ reasoned that the rule barred distribution at any time, including distribution of protected material on nonworking time and in non-working areas.

Rule 33 prohibits "[d]istributing printed matter on company premises without permission." Nevertheless Respondent did not enforce the rule as it is written. The evidence shows that Respondent did not enforce the rule during non-work hours or in non-work areas. Ms. Trespalacios testified that supervisors, including Ms. Reilly, saw her and her coworkers passing out union flyers on company premises during non-work hours in non-work areas and did nothing to stop or discourage her. (Tr. 31:13-33:9.) In practice the rule only applied to work time and work areas, which is lawful. *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB, 335, 335

(1998) ("[A]n employer's prohibition against employee distribution in work areas at all times is presumptively valid"). In any event, Ms. Trespalacios and her coworkers' open distribution of union flyers demonstrates that employees were not inhibited in the exercise of their Section 7 rights.

D. Rule 35 (Unwillingness To Work Harmoniously With Other Employees)

The ALJ found that Rule 35, which obviously has a legitimate and lawful workplace objective, nevertheless violated Section 8(a)(1) of the Act because employees could reasonably construe the language of the rule to prohibit Section 7 activity. (ALJD 11:1-5). The ALJ commented that to "work harmoniously" was so imprecise as to encompass any disagreement among employees, including those related to protected discourse. Again, the ALJ's "reasonable construction" stretches a fair reading of the rule beyond reasonable bounds.

Here, the ALJ has taken a rule, which addresses a legitimate business concern of maintaining order in the workplace, and presumed that it would improperly interfere with Section 7 rights. But there is no factual or logical basis for this presumption. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (affirming finding that rules prohibiting harassment and abuse were lawful because they were intended to maintain order and stating that Board must give rules reasonable reading and not presume improper interference with employee rights).

Moreover, the ALJ has completely ignored the fact that in *Lafayette Park Hotel*, a similar rule prohibiting "[b]eing **uncooperative with supervisors, employees**, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Hotel's goals and objectives" was held to be lawful. *Lafayette Park Hotel*, 326 NLRB 824, 825-26 (1998) (emphasis added). There, the Board stated that to find such a rule unlawful would

"effectively preclude a common sense formulation... [obligating Respondent] to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply." *Id.* Likewise here, the ALJ has disregarded a common sense formulation of a rule which was simply meant to promote order in the workplace, without any evidence that employees would construe it as an impediment to protected activity.

E. Arbitration Agreement

The ALJ found that the maintenance of the arbitration agreement violated Section 8(a)(1) of the Act because according to the ALJ, employees would reasonably understand the arbitration policy to require employees to use Respondent's arbitration procedures instead of filing charges with the Board. (ALJD 11:29-31).

However, the arbitration agreement does not explicitly or implicitly restrict employees from resorting to the Board's remedial procedures. The arbitration agreement is expressly limited to "claims that may be **lawfully** be resolve[d] by arbitration." Jt. Ex. 1, Ex. A (emphasis added). In this context, the Board should not construe the arbitration agreement as precluding resort to the NLRB or any other government agency unless or until Respondent attempts to enforce it in that manner.

There is no evidence that Respondent's intent was to interfere with employee access to the Board and no evidence suggesting that employees had been barred, or even discouraged from seeking Board protection. *See Lutheran Heritage Village-Livonia*, 347 NLRB 646, 647 (2004) (noting that mere fact that rule could possibly be read in unlawful manner is not sufficient, absent evidence that it was actually read in unlawful manner or that it was intended to be applied unlawfully). In fact, in this case, unfair labor practice charges were obviously filed, and Respondent did not seek arbitration. If an occasion arises where Respondent attempts to use the arbitration agreement to prevent employees from accessing the Board, employees may seek

review of the arbitration agreement at that time, but the Board should not find the agreement to be unlawful on its face. *See Aroostoock County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (C.A.D.C. 1996).

Moreover, as a matter of law, an agreement to arbitrate does not waive an employee's right to file charges with the EEOC, or presumably the NLRB, or other parallel federal, state or local agencies. *EEOC v Waffle House*, 534 U.S. 279 (2002); and see *In re Bentley's Luggage Corp.*, 1995 NLRB GCM LEXIS 92 (Aug. 21, 1995). Thus there is no need for the Board to stretch to construe an otherwise lawful arbitration agreement to be an unfair labor practice in order to protect employee access to the Board.

IV. CONCLUSION

Respondent requests that the Board reverse the Administrative Law Judge on the issues discussed above.

DATED: July 23, 2010

Respectfully submitted,

By: _____
Alan R. Berkowitz
Catherine D. Lee
Attorneys for Respondent
2 SISTERS FOOD GROUP, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2010, I caused copies of the

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND REPORT ON OBJECTIONS OF ADMINISTRATIVE LAW JUDGE LANA H. PARKE

to be served on the following parties by U.S. Mail:

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